

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION ET AL.,

Plaintiffs,

v.

AMAZON.COM, INC., a corporation,

Defendant.

CASE NO. 2:23-cv-01495-JHC

ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS COUNTS XIV, XV,
AND XIX

I
INTRODUCTION

This matter comes before the Court on Defendant Amazon’s Motion to Dismiss Counts XIV, XV, and XIX of Plaintiffs’ Second Amended Complaint. Dkt. # 340. Plaintiffs New Jersey and Pennsylvania claim that Amazon violates the New Jersey Consumer Fraud Act (NJCFRA), N.J. Stat. Ann. § 56:8-2, by engaging in unconscionable commercial practices (Count XIV), Dkt. # 327, 144–46, ¶¶ 513–23; the NJCFRA by knowingly concealing material facts (Count XV), *id.* at 147–49, ¶¶ 524–33; and the Pennsylvania Unfair Trade Practices and Consumer Protection Law (PUTPCPL), 73 Pa. Cons. Stat. §§ 201-1–201-10, by engaging in unfair methods of competition and unfair or deceptive acts (Count XIX), Dkt. # 327 at 152–64, ¶¶ 545–95. Amazon seeks dismissal of these claims under Federal Rule of Civil Procedure

12(b)(6) for failure to state a claim upon which relief can be granted. The Court has reviewed the materials filed in support of and in opposition to the motion, the rest of the case file, and the governing law. Being fully advised, the Court GRANTS the motion and dismisses Counts XIV, XV, and XIX with prejudice.

II BACKGROUND

The Federal Trade Commission (FTC), various states, and Puerto Rico sued Amazon for violating federal and state antitrust laws, Section 5 of the FTC Act, 15 U.S.C. § 45(a), and state consumer protection laws. Dkt. # 289 at 1–2. Pertinent here, Plaintiffs New Jersey and Pennsylvania claimed that Amazon violated: (1) the NJCFA by engaging in unconscionable commercial practices and deception, *id.* at 30–31; and (2) the PUTPCPL by engaging in monopolistic behavior and by misrepresenting that its pricing is fair, *id.* at 34–35.

Amazon moved to dismiss these claims in Plaintiffs’ first amended complaint for failure to state a claim. *Id.* The Court dismissed the NJCFA and PUTPCPL claims without prejudice and granted leave to amend. *Id.* at 30–37, 50–51. Pennsylvania moved for reconsideration of the Court’s dismissal of its PUTPCPL claim, and the Court denied the motion. Dkt. ## 306; 308. Plaintiffs filed a second amended complaint, in which New Jersey and Pennsylvania amended their NJCFA and PUTPCPL claims. Dkt. # 327 at 144–46, 152–64, ¶¶ 513–23, 545–95. New Jersey also asserts a new NJCFA claim, alleging that Amazon knowingly concealed material facts. *Id.* at 147–49, ¶¶ 524–33.

New Jersey and Pennsylvania’s NJCFA and PUTPCPL claims focus on Amazon’s use of its Project Nessie algorithm. They allege as follows: In the early 2010s, Amazon found that when it raises prices for products, many other online store competitors will also raise their prices. *Id.* at 127–28, ¶ 421. Amazon created Project Nessie, an algorithm that predicts the likelihood

1 that another online store will match Amazon’s price increases. *Id.* at 128, ¶ 422. To increase its
 2 profits, Amazon began using Project Nessie in 2014 to focus its price increases on products that
 3 were also sold by online stores likely to match Amazon’s prices. *Id.* at 127–28, ¶¶ 421–22.
 4 Because these online stores generally matched Amazon’s price increases, shoppers were less
 5 likely to realize that they were paying inflated prices. *Id.* at 127–28, ¶ 421. Amazon temporarily
 6 turned Project Nessie “off” during periods of increased media focus and customer traffic, after
 7 which Amazon turned it back “on” to make up for lost profits. *Id.* at 129–30, ¶¶ 428–29.

8 III 9 DISCUSSION

10 In reviewing a motion to dismiss under Rule 12(b)(6), the Court takes all well-pleaded
 11 factual allegations as true and determines whether the complaint “state[s] a claim to relief that is
 12 plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
 13 *Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads
 14 factual content that allows the court to draw the reasonable inference that the defendant is liable
 15 for the misconduct alleged.”¹ *Id.* Although the Court draws all reasonable inferences in favor of
 16 Plaintiffs, the Court is not “required to accept as true allegations that are merely conclusory,
 17 unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*,
 18 266 F.3d 979, 988 (9th Cir. 2001).

19 A. New Jersey Consumer Fraud Act Claims

20 The NJCFA prohibits “any commercial practice that is unconscionable or abusive,
 21 deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment,
 22 suppression, or omission of any material fact . . . in connection with the sale or advertisement of

23 ¹ The parties dispute whether NJCFA claims “must be alleged with particularity under a
 24 heightened pleading standard.” Dkt. # 371 at 13–14. The Court need not reach this issue because even
 under the usual pleading standard, New Jersey fails to state claims under the NJCFA.

1 any merchandise.” N.J. Stat. Ann. § 56:8-2. New Jersey alleges that Amazon engages in
2 unconscionable commercial practices and knowing concealment of material facts by covertly
3 using Project Nessie to inflate its prices. Dkt. # 327 at 145–48, ¶¶ 519–20, 530–32.

4 1. Unconscionable commercial practices (Count XIV)

5 New Jersey does not state a claim that Amazon’s use of Project Nessie is unconscionable
6 under the NJCFA. For conduct to be unconscionable, it must have the capacity to mislead. New
7 Jersey suggests that because the NJCFA is disjunctive, “unconscionable” must have a meaning
8 entirely distinct from that of other prohibited acts such as “deception.” But New Jersey courts
9 have held that, as with other conduct that is unlawful under the NJCFA, “capacity to mislead is
10 the prime ingredient of . . . an unconscionable commercial practice.” *Sickles v. Cabot Corp.*, 877
11 A.2d 267, 276 (N.J. Super. Ct. App. Div. 2005) (quoting *Fenwick v. Kay Am. Jeep, Inc.*, 371
12 A.2d 13, 16 (N.J. 1977)).

13 One federal district court suggests in dicta that by “prime ingredient,” the Supreme Court
14 of New Jersey means that capacity to mislead is a typical feature, rather than an indispensable
15 element, of an NJCFA claim because “the [NJCFA] should be construed liberally in favor of
16 consumers.” *See In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 350 F. Supp. 2d 160,
17 194 & n.54 (D. Me. 2004) (quoting *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 461 (N.J.
18 1994)). But because “unconscionable” appears in a list, it must, to some degree, “be equated
19 with the concepts of deception, fraud, false pretense, misrepresentation, concealment and the
20 like, which are stamped unlawful under [the NJCFA].” *Kugler v. Romain*, 279 A.2d 640, 652
21 (N.J. 1971). Although courts define unconscionability on a “case-by-case basis,” the concept is
22 most applicable when a commercial practice has the capacity to mislead a consumer who lacks
23 the “ability to negotiate in a meaningful fashion.” *Id.* at 651–52.

1 New Jersey raises three theories of unconscionability, none of which are persuasive.
 2 First, New Jersey says that Amazon’s conduct is unconscionable because it uses Project Nessie
 3 to charge “exorbitant prices.” Dkt. # 371 at 13 (quoting *Skeer v. EMK Motors, Inc.*, 455 A.2d
 4 508, 512 (N.J. Super. Ct. App. Div. 1982)). But even if charging exorbitant prices alone were
 5 unconscionable, Amazon uses Project Nessie to charge prices that other online stores would
 6 match. Dkt. # 327 at 128, ¶¶ 422–23. Because Amazon uses Project Nessie to charge prices that
 7 adhere to “market forces present in our capitalist society,” such conduct is not plausibly
 8 unconscionable. *Yingst v. Novartis AG*, 63 F. Supp. 3d 412, 416–17 (D.N.J. 2014).
 9 New Jersey tries to distinguish *Yingst* by pointing out that Amazon extracted over a billion
 10 dollars in profits, Dkt. # 327 at 129, ¶ 425, but cites no authority suggesting that making
 11 exorbitant profits through a series of lawful transactions is unconscionable under the NJCFA.

12 Second, New Jersey conflates its claims in asserting that Amazon “misleads” consumers
 13 by not disclosing its use of Project Nessie. Whether Amazon has a duty to disclose its use of
 14 Project Nessie relates to New Jersey’s claim of knowing concealment, not unconscionability.
 15 For conduct to have the capacity to mislead for unconscionability purposes, an agreement must
 16 be “so one-sided as to ‘shock the conscience’ of the court.” *Yingst*, 63 F. Supp. 3d at 416
 17 (quoting *Travelodge Hotels, Inc. v. Honeysuckle Enters., Inc.*, 357 F. Supp. 2d 788, 801 (D.N.J.
 18 2005)). Amazon’s use of Project Nessie is not one-sided as to other online stores or purchasers
 19 of Amazon’s products. Project Nessie merely predicts the likelihood that other online stores will
 20 follow an Amazon price increase.² Dkt. # 327 at 127–28, ¶¶ 421–22. And because Amazon uses

21
 22 ² New Jersey alleges that Amazon uses “seller punishment tactics and high seller fees” to force
 23 sellers “to use Amazon’s inflated prices as a price floor everywhere else in the marketplace, resulting in
 24 online shoppers facing artificially higher prices even when shopping somewhere other than Amazon.”
 Dkt. # 327 at 146, ¶ 521. But New Jersey does not explain in its response how this allegation is enough to
 state a claim of unconscionability under the NJCFA. *See* Dkt. # 371 at 12–18.

1 Project Nessie to raise its prices before a consumer buys a product, the consumer can buy the
2 product from a different seller at the same or lower price. To be sure, consumers may not find
3 lower prices because other online stores match Amazon’s prices. But this results from broader
4 market forces, not conduct that plausibly has the capacity to mislead consumers who lack “real
5 bargaining” power.³ *Kugler*, 279 A.2d at 652.

6 Finally, New Jersey contends that because it adequately states a claim under the New
7 Jersey Antitrust Act (NJAA), N.J. Stat. Ann. §§ 56:9-1–56:9-19,⁴ it also states a claim of
8 unconscionability under the NJCFA. New Jersey says that *Sickles*, which observes that
9 anticompetitive conduct must have a capacity to mislead to be unconscionable, 877 A.2d at 276–
10 77, is outdated because of subsequent legislation. In *Sickles*, a purchaser of tires filed a class
11 action against companies that produce, manufacture, and sell a primary ingredient in tires. *Id.* at
12 269. In dismissing the plaintiff’s NJCFA claim, the court noted that there was “nothing
13 inherently misleading in defendants’ alleged acts of controlling the supply and overcharging for
14 the price-fixed products.” *Id.* at 277. The court also held that the plaintiff lacked standing
15 because allowing him to sue under the NJCFA would allow an end-run around the NJAA, which
16 did not grant standing to indirect purchasers like the plaintiff. *Id.*

17 After the *Sickles* decision, the New Jersey Legislature allowed indirect purchasers to sue
18 under the NJAA, N.J. Stat. Ann. § 56:9-12, and amended the NJCFA to provide that “any
19 commercial practice that violates State or federal law is conclusively presumed to be an unlawful
20 practice under [§ 56:8-2].” N.J. Stat. Ann. § 56:8-4(b). These legislative developments,

22 ³ Because New Jersey does not adequately allege that Amazon’s use of Project Nessie has the
23 capacity to mislead for unconscionability purposes, the Court need not reach whether New Jersey must
also allege a specific deceptive statement.

24 ⁴See Dkt. # 289 at 44–45.

1 however, did not eliminate the requirement that for conduct to be unconscionable under the
2 NJCFA, it must have the capacity to mislead. That indirect purchasers can now sue under the
3 NJAA does not mean that any NJAA claim is also cognizable under the NJCFA. And even if a
4 violation of state or federal antitrust laws creates a presumption of an unlawful practice under the
5 NJCFA, Amazon has rebutted that presumption by showing that its use of Project Nessie does
6 not have the capacity to mislead consumers.

7 Thus, the Court dismisses with prejudice New Jersey’s claim that Amazon engages in
8 unconscionable commercial practices under the NJCFA (Count XIV).

9 2. Knowing concealment of material facts (Count XV)

10 New Jersey does not adequately allege that Amazon violates the NJCFA by knowingly
11 concealing its use of Project Nessie from consumers. For there to be knowing concealment, a
12 defendant must have a duty to disclose the facts that are withheld. *Judge v. Blackfin Yacht*
13 *Corp.*, 815 A.2d 537, 542–43 (N.J. Super. Ct. App. Div. 2003). “Duty is a question of law” that
14 “must be determined in light of the factual circumstances.” *Id.* at 542. Even if a business has a
15 duty to disclose that it is charging significantly more than the value of a product, *see, e.g., In re*
16 *NorVergence, Inc.*, 384 B.R. 315, 359–60 (Bankr. D.N.J. 2008), New Jersey does not allege that
17 Amazon uses Project Nessie to drastically inflate prices. Nor does New Jersey allege facts
18 showing that Amazon has a duty to disclose to consumers how it sets its prices. *See BCR*
19 *Carpentry LLC v. FCA US, LLC*, 2024 WL 4570734, at *8 (D.N.J. Oct. 24, 2024) (no duty to
20 disclose that charges were inflated to produce a profit).

21 Thus, the Court dismisses with prejudice New Jersey’s claim that Amazon violates the
22 NJCFA by knowingly concealing material facts (Count XV).

1 B. Pennsylvania Unfair Trade Practices and Consumer Protection Law Claim (Count XIX)

2 The PUTPCPL prohibits “[u]nfair methods of competition and unfair or deceptive acts or
3 practices in the conduct of any trade or commerce.” 73 Pa. Cons. Stat. § 201-3(a). Pennsylvania
4 contends that Amazon violates the PUTPCPL by (1) failing to disclose its use of Project Nessie;
5 (2) making misleading statements in its Price Matching Policy; and (3) violating Section 5 of the
6 FTC Act.

7 1. Failure to disclose material facts

8 Pennsylvania fails to state a claim that Amazon violates the PUTPCPL by failing to
9 disclose its use of Project Nessie. Failure to disclose a material fact can be deceptive conduct.
10 *See Com., by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812, 829–30 (Pa. 1974). But
11 for “silence to be actionable there must be a duty to speak.” *Zwiercan v. Gen. Motors Corp.*,
12 2002 WL 31053838, at *2 (Pa. Com. Pl. Sept. 11, 2002). Pennsylvania contends that Amazon
13 has a duty to disclose its use of Project Nessie because it is anticompetitive conduct.

14 Although failure to disclose anticompetitive conduct can violate the PUTPCPL, Amazon
15 does not have a duty to disclose its use of Project Nessie. In *Anadarko Petrol. Corp. v.*
16 *Commonwealth*, the court held that failure to disclose anticompetitive conduct can violate § 201-
17 2(4)(xxi), a catch-all provision of the PUTPCPL that prohibits “[e]ngaging in any other
18 fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.”
19 206 A.3d 51, 61 (Pa. Commw. Ct. 2019) (en banc), *aff’d in part, rev’d in part sub nom.*
20 *Commonwealth v. Chesapeake Energy Corp.*, 247 A.3d 934 (Pa. 2021); *see also Connecticut v.*
21 *Sandoz, Inc.*, 2024 WL 4753308, at *22–23 (D. Conn. Nov. 12, 2024) (relying on *Anadarko*).
22 But in *Anadarko*, the plaintiff alleged that the defendant failed to disclose a joint venture
23 agreement and a market allocation agreement. 206 A.3d at 66 (Covey, J., concurring in part and
24

1 dissenting in part). Because Project Nessie is a predictive pricing tool rather than an agreement,
2 its use is too attenuated from any anticompetitive ends to be subject to a duty to disclose.

3 2. Misleading statements

4 Pennsylvania also fails to state a claim that Amazon violates the PUTPCPL by making
5 misleading statements in its Price Matching Policy. Under the PUTPCPL, “deception need not
6 be an outright false statement; representations of implied claims that are false is deceptive even if
7 the explicit claims are true.” *Com. ex rel. Corbett v. Peoples Benefit Servs., Inc.*, 895 A.2d 683,
8 694 (Pa. Commw. Ct. 2006) (citing *Miller v. Am. Fam. Publishers*, 663 A.2d 643 (N.J. Super. Ct.
9 Ch. Div. 1995)). Amazon tells consumers that it does not offer price matching because it
10 “consistently works toward maintaining competitive prices,” “strive[s] to maintain low and
11 competitive prices,” and “constantly compare[s] [its] prices to [its] competitors’ prices to make
12 sure that [they] are as low or lower than all relevant competitors.” Dkt. # 327 at 154–55, ¶¶ 558–
13 59. Although these statements are generally true because Amazon uses Project Nessie to raise—
14 but not exceed—the floor of prices in the marketplace, Pennsylvania asserts that these statements
15 are misleading because they imply that Amazon offers uninflated prices.

16 Amazon’s bare statements that it offers low and competitive prices are not actionable
17 under the PUTPCPL. Pennsylvania does not point to a direct statement by Amazon that it offers
18 low prices, but merely to Amazon’s justifications for not offering a price matching policy. These
19 justifications cannot be construed as claims that Amazon sets prices free from anticompetitive
20 influence. Because they are “vague promises of cost savings and competitive rates” rather than
21 “measurable factual assertions” about its products, Amazon’s justifications are non-actionable
22 puffery. *Landau v. Viridian Energy PA LLC*, 223 F. Supp. 3d 401, 416–17 (E.D. Pa. 2016); *cf.*
23 *Commonwealth by Shapiro v. Golden Gate Nat’l Senior Care LLC*, 194 A.3d 1010, 1024 (Pa.
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1 2018) (a nursing home’s promises to provide food, water, and clean linens are not puffery as a
2 matter of law because consumers could take these promises seriously).

3 3. Violation of Section 5 of the FTC Act

4 Pennsylvania contends that because Plaintiffs’ challenge to Project Nessie under Section
5 5 of the FTC Act survived the previous motion to dismiss, Dkt. # 289 at 22–27, its PUTPCPL
6 claim should also proceed. The Court rejected this contention in its previous order dismissing
7 Pennsylvania’s PUTPCPL claim, *id.* at 34–37, and in its order denying Pennsylvania’s motion
8 for reconsideration, Dkt. ## 306; 308. Pennsylvania says that the law of the case does not bar
9 this contention because it alleges new factual allegations and clarifies the elements to state its
10 claim. Even if the law of the case does not apply, this contention is unpersuasive.

11 Pennsylvania relies on two Pennsylvania Supreme Court decisions. In *Ash v. Cont’l Ins.*
12 *Co.*, 932 A.2d 877, 881 (Pa. 2007), the court cited 1 Pa. Cons. Stat. § 1932, which provides, “(a)
13 Statutes or parts of statutes are in *pari materia* when they relate to the same persons or things or
14 to the same class of persons or things” and “(b) Statutes in *pari materia* shall be construed
15 together, if possible, as one statute.” Pennsylvania says that the FTC Act and the PUTPCPL are
16 *in pari materia* because the Pennsylvania Supreme Court has observed that “in all relevant
17 respects the language of section 3 of the [PUTPCPL] and section 5 of the FTC Act is identical.”
18 *Monumental Properties*, 329 A.2d at 462. Thus, Pennsylvania contends that violating Section 5
19 of the FTC Act also violates the PUTPCPL.

20 But even if a state statute can be *in pari materia* with a federal statute under 1 Pa. Cons.
21 Stat. § 1932, *Monumental Properties* does not hold that the PUTPCPL is *in pari materia* with the
22 FTC Act. In *Monumental Properties*, the court considered “whether the [PUTPCPL] covers
23 allegedly unfair or deceptive practices *in connection with the leasing of housing*.” 329 A.2d at
24 815 (emphasis added). The court was concerned with whether the subject matter of leases—not

specific unfair or deceptive practices—fell under the PUTPCPL. By contrast, the issue here is whether Amazon’s use of Project Nessie is an unfair or deceptive practice under the PUTPCPL.⁵

Whereas the FTC Act does not define “unfair or deceptive acts,” the PUTPCPL prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce *as defined by subclauses (i) through (xxi) of clause (4) of section 2 of this act and regulations promulgated under section 3.1 of this act.*” 73 Pa. Cons. Stat. § 201-3(a) (emphasis added). Thus, the court in *Anadarko* concluded that “the scope of actionable antitrust behavior under the [PUTPCPL] is narrower than under federal antitrust law.” 206 A.3d at 60. Although § 201-2(4)(xxi) of the PUTPCPL is a catch-all provision, it is limited to “fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.” Because conduct that does not involve fraud or deception does not fall under this catch-all provision, the Court agrees with other courts that have relied on *Anadarko* to hold that claims of pure anticompetitive conduct are not actionable under the PUTPCPL. *See In re HIV Antitrust Litig.*, 2023 WL 3006572, at *4 & n.2 (N.D. Cal. Apr. 18, 2023).

Contrary to Pennsylvania’s assertions, *Anadarko*’s interpretation of the PUTPCPL adheres to *Ash* and *Monumental Properties*. In *Ash*, the court concluded that the PUTPCPL and the bad faith insurance statute, 42 Pa. Cons. Stat. § 8371, are not *in pari materia* because unlike the PUTPCPL, which reaches a broad range of conduct, the bad faith insurance statute “applies only in limited circumstances.” 932 A.2d at 881–82. Similarly, the FTC Act is not *in pari*

⁵ For this reason, the Court rejects Pennsylvania’s assertion that anticompetitive conduct must fall within the reach of the PUTPCPL because the statute does not expressly exclude antitrust claims. Pennsylvania relies on an observation in *Monumental Properties* that “[w]hen the Legislature deemed it necessary to make an exception from the Law’s scope, it did so in clear language.” 329 A.2d at 815 n.5. But the court made this statement in the context of observing that the PUTPCPL expressly excludes entire “classes of transactions,” such as an exception for printers acting in good faith. *Id.* The court did not hold that the lack of an exception for a type of unfair or deceptive act implies that such conduct is actionable under the PUTPCPL.

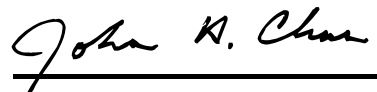
1 *materia* with the PUTPCPL because the FTC Act, unlike the PUTPCPL, does not define unfair
2 or deceptive acts. And although the court in *Monumental Properties* declined to hold that the
3 canon of *ejusdem generis* constrains the scope of the PUTPCPL’s catch-all provision, the court
4 held that the catch-all provision—which “was designed to cover generally all unfair and
5 deceptive acts or practices”—is intended to reach a broad range of fraudulent, rather than
6 anticompetitive, conduct. 329 A.2d at 826–27.

7 Thus, the Court dismisses with prejudice Pennsylvania’s claim that Amazon violates the
8 PUTPCPL (Count XIX) by allegedly failing to disclose its use of Project Nessie, making
9 misleading statements in its Price Matching Policy, and violating Section 5 of the FTC Act.

10 **IV**
11 **CONCLUSION**

12 For these reasons, the Court GRANTS Amazon’s Motion to Dismiss. The Court
13 DISMISSES Counts XIV, XV, and XIX of Plaintiffs’ Second Amended Complaint with
14 prejudice.

15 Dated this 20th day of March, 2025.

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17 John H. Chun
18 United States District Judge
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